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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Written statement* submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 January 2002]

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*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE. *200201049O*
ENG

Right of abode in Hong Kong SAR

1. Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states in article 10(1) that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society".

2. Hong Kong Special Administrative Region of the People's Republic of China is bound by the provisions of the ICESCR, as the United Kingdom—upon ratifying the covenant in 1976—applied it to its colonial territory of Hong Kong the same year. Although Hong Kong was returned to the sovereignty of the People's Republic of China in 1997, the Government of China, in its letter of notification of treaties deposited with the UN Secretary-General, stated that the ICESCR would continue to be observed in Hong Kong SAR. Moreover, this declaration is codified in article 39 of the Basic Law, the mini-Constitution of Hong Kong SAR.

3. On January 29, 1999, the Court of Final Appeal (CFA), the highest court in the Hong Kong SAR, ruled that all Chinese citizens who are children of the SAR's permanent residents born outside of Hong Kong SAR have the right of abode in Hong Kong SAR, irrespective of whether their parents had become permanent residents at the time of their birth or not. At the request of the Government of Hong Kong SAR, however, the Standing Committee of the National People's Congress (NPC) in Beijing reinterpreted articles 22(4) and 24(2)(3) of the Basic Law on June 26, 1999, and in effect overturned the CFA's decision of January 29, denying retrospectively the right of abode in Hong Kong SAR to thousands of people from mainland China. In its ruling, the NPC Standing Committee said that those born before one of their parents became a permanent resident of Hong Kong SAR did not have right of abode there. For those who qualify, the mechanism for gaining right of abode in the SAR—the Standing Committee of the NPC said—is to get a one-way permit from mainland authorities before resettling.

4. After the announcement of the NPC Standing Committee, however, the chief executive of the Hong Kong SAR said that those people from the mainland who had arrived in Hong Kong between 1 July 1997 and 29 January 1999 and who had made a claim could remain in the Hong Kong SAR and would be granted right of abode, although the authorities generally had refused to accept any.

5. After the Hong Kong SAR government made this concession, 5114 individuals filed a new claim to right of abode. This group claimed that they had followed the advice of the chief executive and other government officials made in public statements and/or in reply to written requests to the government's Legal Aid Department not to file legal cases for right of abode until the CFA ruling of 29 January 1999. Thus, when the chief executive of the Hong Kong SAR issued the government's concessionary policy, they felt that they had been misled and had a legitimate expectation through both oral and written statements that their status would be determined after the CFA ruling of 29 January 1999. On 10 January 2002 the CFA found that the claimants had no right of abode, except for about 400 claimants who had letters from the Legal Aid Department asking them to refrain from legal action.

6. The above decisions have resulted in many personal tragedies. Li Xiru, aged 72, lost his claim for right of abode and so will be unable to care for his 95 year-old ailing father. Fang Chu-jun, a 20 year-old girl with physical and mental disabilities denied right of abode will have to return to the mainland. The oldest son of the Lam family, Lam Kam-ming, aged 20, will be forced to return to the mainland while their 6 year-

old daughter is allowed to stay.

7. In May 2001 the Committee on Economic, Social and Cultural Rights made the following observations regarding Hong Kong SAR (E/C.12/1/Add.58):

C. Factors and difficulties impeding the implementation of the Covenant

. . .

(12) The Committee notes that issues regarding the right of abode in relation to permanent residence and split families impede the enjoyment of economic, social and cultural rights by the families affected by the reinterpretation on 26 June 1999 by the National People's Congress Standing Committee of article 24 of the Basic Law.

. . .

(40) When formulating and implementing its policies on permanent residence and split families, HKSAR is urged to give the most careful attention to all the human rights dimensions of the issue, including articles 2 (2), 3 and 10 of the Covenant. The Committee reminds HKSAR that any limitations in connection with article 10 must be justified in relation to each element set out in article 4. The Committee urges HKSAR to reconsider extending the "concession" made by HKSAR following the reinterpretation of 26 June 1999.

(41) HKSAR is urged to enhance the transparency of all relevant processes concerning permanent residence and split families. For example, the Committee recommends that all data, appropriately disaggregated (e.g. by origin of applicant), are made publicly available and tabled in the Legislative Council every six months.

8. Denying members of these families the right to live together in the same homes and communities erodes the cohesion and care provided by the family and breaches the Hong Kong SAR government's obligation to protect and assist the family as mandated in article 10(1) of the ICESCR. For these reasons the Asian Legal Resource Centre calls upon the Government of Hong Kong SAR to urgently consider granting right of abode to all of those who lost their court case and allow them to remain in Hong Kong with their families on humanitarian grounds. For those who have not filed a court case and may be living in mainland China, the Asian Legal Resource Centre asks the Government of Hong Kong SAR to work to reunite them with their families as soon as possible.